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HAROLD B. WILLEY,

No. 12

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR REHEARING

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TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903	9
Boyd v. United States, 116 U. S. 616	18
Brown v. Allen, 334 U. S. at 475	4
Casey v. United States, 273 U. S.	6
Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 814	8, 9
Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270	5, 9, 10
Lisenba v. California, 314 U. S. 236, 86 L. Ed. 180	9, 10
Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029	5, 10
McNabb v. United States, 318 U. S. 332, 87 L. Ed. 819	8
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791	8, 9
Rochin v. California, 342 U. S. 165	13
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 694	4
Sorrells v. United States, 287 U. S. 435	6
Strobel v. California, 343 U. S. 181, 96 L. Ed. 872	5, 10
United States v. Kahriger, 345 U. S. 22	16, 17, 18
Weeks v. United States, 232 U. S. 383	15
Wolf v. Colorado, 338 U. S. 25, 27	3, 6, 12

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Codes, Statutes, etc.

Page

Article I, Section 19, Constitution of California 3, 4, 14

Fourteenth Amendment of the Constitution of the United States 3, 4, 12

Fourth Amendment of the Constitution of the United States 2, 3, 4, 6, 9, 13, 14, 15

Penal Code of California, Section 653(f) 7

65 Stats. 529, 26 U. S. C. (Supp. V) Sec. 3285 16

APPENDIX INDEX

Appendix A—St. Louis Post-Dispatch, Tuesday, February 9, 1954 ..... App. 1

Appendix B—Los Angeles Herald & Express, Tuesday, February 9, 1954 ..... App. 3

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PETITION FOR REHEARING

To The Honorable Earl G. Warren, Chief Justice of the Supreme Court of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

We respectfully pray for rehearing.

We urge errors both of fact and of law as grounds for our rehearing.

No case has shocked the legal or newspaper profession in the nation more than this one. The decision has received wide-spread comment, resulting in calls,

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newspaper comment and criticism of a very wide and earnest nature. We attach herewith as an appendix editorial comments regarding the same.

The American way of life is at stake. The example of this case, insignificant in its effect upon the defendant, will have world-wide repercussion as an example of American justice or injustice. Our boast of our home inviolability is demonstrated in reverse.

This counsel had the privilege of being attorney for Edwin W. Pauley after Mr. Pauley represented the United States Government in various trips abroad. One of these trips was made into Russia. Mr. Pauley described to this counsel how every room he was in had secret sound recording device. Mr. Pauley thought it was shocking. But, it is no more shocking than the liberty given by this court to our own police in its decision in this case. No better—or worse—case will ever come before this court. The court has described the actions of the police as "incredible, if it was not admitted." "Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principles declared by the Fourth Amendment as a restriction on the Federal Government," etc., says the majority opinion; yet the Court upholds this flagrant, deliberate and persistent violation of the fundamental principles by approving the use of the evidence obtained by this method.

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It says that a fair trial results even though obtained by foul methods.

In the field of sports, a "foul ball" does not count as a strike. Unfair tactics on the football field penalizes the team; an off-side play costs the team 15-yards, and thereby may cost the game. A punch below the belt, in the prize fight ring, costs the puncher the fight.

The Fourteenth Amendment has been described in various cases by this Court as the sporting man's idea of fair play in a trial. Is it fair play to use evidence tainted with illegality, secured in violation of the principles laid down by the Fourth Amendment which the founding fathers insisted be made a part of our Constitution, and which has a history of long and vigorous fighting on the part of the American people to secure its protection? California's Article I, Section 19, is in similar language.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The decision in *Wolf v. Colorado,* 338 U. S. 25, 27, for the first time established that "The security of one's privacy against arbitrary intrusion by the police"

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is embodied in the concept of due process found in the Fourteenth Amendment. The court, in its decision, has overlooked the basic principle established by that Constitutional Amendment.

California has a similar provision in Article I, Section 19, of the Constitution. With the exception of a few words altered, the identical provision is contained in that Amendment.

Therefore, the California provision in its Constitution must be construed identically with the construction of the Fourth Amendment to the Constitution of the United States.

In *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 694, Mr. Justice Roberts said:

> "Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

In *Brown v. Allen*, 344 U. S. at 475, this court said:

> "Therefore, it does not matter in this case whether or not the jury was acquainted with all the facts laid before the judge upon which petitioner now relies or whether the jury heard or did not hear the petitioner testify. Neither does it matter that there possibly is evidence in the record independent of the confessions which could sustain the verdict. The mere admission of the con-

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> fessions by the trial judge constituted a use of them by the state, and if the confessions were improperly obtained, such a use constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment."

The same may be said *arguendo* regarding the use of confession illegally obtained by police brutality. They still go on and the lower courts, and even this court is restrained constantly to enforce the rule after its violation, both federally and state wise. But, it does not change the fact that the use of such evidence violates those fundamental principles of liberty and justice that are at the base of our institutions and for which we try to set an example.

Hebert v. Louisiana, 272 U. S. 312;
Strobel v. California, 343 U. S. 181, 96 L. Ed. 872;
Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.

The court has now stated that though the methods are wrong if the result is right, it embodies the fundamental concept of due process of law.

But, when this court said that the "evidence tainted with illegality may be used in a courtroom" it defiles the temples of justice and does violate the basis American concept against unreasonable searches and seizures.

The fruit of the poisonous tree is used with judicial approval.

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The temple of justice is thus defiled.

This court has said in *Sorrells v. United States,* 287 U. S. 435, that the purity of the court belongs to the court. When the courts approve the use of such evidence, it cannot escape the charge that it is a part of the illegal machinery. To the extent, therefore, that *Wolf v. Colorado* fails to reject the poisonous fruit and says that a fair conviction can result from foul means, this Court should now rehear the case and overrule that doctrine.

Mr. Justice Clark, in his concurring opinion, stated that had he sat on the court when Wolf was decided, he would have gone the other way. We appeal to Mr. Justice Clark to vote for a rehearing in this case, and thus enable us again to consider whether the concept of the Fourth Amendment, basic in our American way of life, should become a basic doctrine for all of the states.

In the case of entrapment, where the acts would otherwise be a crime, but for the conduct of officers of the law, this court has said, in *Sorrells v. United States,* 287 U. S. 435, and in *Casey v. United States,* 273 U. S. that such conduct is against public policy; that public policy forbids holding a conviction based upon such conduct of officers of the law. But, here the evidence obtained is by methods far more contrary to the public policy of the American way of life.

(1) It was an entry into petitioner's home without a search warrant. (2) It was a burglary. (3) A key

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was made without his knowledge or consent. (4) A hole was drilled into his roof and a recording device was installed therein. (5) The device was installed without the consent or permission or provisions of the Penal Code of California, Section 653(f). (6) Recordings were taken for more than a month in a private bedroom of the petitioner. (7) He was ordered to exhibit his hands to an examination of an ultra-violet lamp after entry had been made into his house without any warrant.

When the court says in one breath that it was wrong to use these methods and yet it approves of the use of the evidence thus obtained, is it not like saying to a thief—you stole my money, but now that you have it it is all right to use it as you see fit.

Yet no court has ever allowed the thief to keep the property that he stole, even though he stood prosecution for it and was convicted of it.

The evidence in this case was stolen from the appellant. The entry, as the court has expressed it, was obtained through a burglary. The papers and the documents were the fruit of that burglarous entry. It is no answer for the courts to say that the officers engaged in the enterprise may now be prosecuted under the civil rights act for their misconduct in the case, when the court itself is willing to accept the fruits of their illegal enterprise, and if they should be prosecuted the argument would forcibly be made to the jury that they caught a criminal and that the Supreme Court

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approved the use of the evidence. So, what difference does it make how or what they did; a conviction under those circumstances would be well-nigh impossible. Nor does it get away from the basic question, far more fundamental. That basic question was presented by Mr. Chief Justice Hughes in *Mooney v. Holohan*, 294 U. S. 103, where this court held that perjured evidence, knowingly secured, through officers of the state, would be rejected and would form the basis of granting a writ of habeas corpus even twenty years after a conviction.

Many times this court has weighed the importance of rejecting improperly secured evidence as the basis for voiding a judgment. Thus, this court has repeatedly evidence obtained by an illegally secured confession as in violation of the concept of ordered liberty.

> *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 814.

Where confessions are obtained without arraignment, it has been held that the procedural violation bars the use of the confession.

> *McNabb v. United States*, 318 U. S. 332, 87 L. Ed. 819.

Due process of law embodied in its concept is a fundamental fairness in every stage of the criminal procedure, and that fundamental fairness is denied when there has been a use of fraud, collusion, trickery and

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subordination of perjury on the part of the State prosecution.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;

Lisenba v. California, 314 U. S. 236, 86 L. Ed. 180.

A defendant induced to testify against himself by threats or promises in the presence of the court or jury.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 814.

The use of evidence in violation of the Fourth Amendment to the Constitution of the United States.

Hague v. C. I. O.

By the use of evidence obtained by such lawless methods, has the appellant received a trial consonant with standards accepted by this nation as adequate to justify his conviction?

See

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270;

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903.

The majority opinion makes a "practical" approach to its decision. It says:

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> "The extent to which the practice (of illegal search and seizure) was curtailed, if at all, is doubtful. The lower federal courts, and even this court, have repeatedly been constrained to enforce the rule after its violation."

The same may be said, *arguendo,* regarding the use of confessions illegally obtained by Police brutality. They still go on and the lower court, and even this court, is restrained constantly to enforce the rule after its violation, both federally and state wise. But,, it does not change the fact that the use of such evidence violates those fundamental principles of liberty and justice that are at the base of our institutions and for which we try to set an example.

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270;

Strobel v. California, 343 U. S. 181, 96 L. Ed. 872;

Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.

We respectfully submit that the use of evidence illegally obtained, as in this case, is repugnant to "that fundamental fairness essential to the very concept of justice."

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 156.

It is like permitting a ball team to win its game on foul balls and to let the runners run and count the

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score even though the ball was a foul. In football, where a player has been off-side, even though another man reaches the goal with the ball, the players will be called back and the score will not be counted. Shall there be any less fairness in the game of life, when either life or liberty is at stake, shall this be the American standard? Can the purity of a judgment rest upon the impurity in the course of its procurement? Can evidence tainted with impurity—secured by housebreaking and invasion of privacy, give a pure judgment? We say, most respectfully, that it cannot.

We urge this court, once and for all, to rehear this matter and, once and for all, to disapprove court use anywhere in the United States of the use of stolen property secured by "methods that are incredible if they were not admitted."[1]

We therefore appeal to Justice Clark, in view of the language of his concurring opinion, to vote for a

[1]From a practical standpoint the rejection of evidence illegally secured has probably had a far greater effect in the federal courts and in those states where it is used than this court seems to envision. The F.B.I. and its school for officers gives lectures on the subject at great length; so, too, in the states where use of such evidence is forbidden, the officers are instructed not to use it; and few, if any, cases have come to the United States Supreme Court from those states, showing that it is more observed than breached therein and that its own courts enforce the rule. The trouble with trying to get legislation through to enforce the exclusion of such evidence in states is that peace officers of the various states have become organized and are politically active against any measures that will make them work more. As long as the courts will accept and not reject the evidence they feel secure in the lazy, illegal approach. In California, the counsel for this appellant has at two sessions of the Legislature proposed laws excluding the illegal evidence. A justice of the State Supreme Court has likewise proposed such legislation. Promptly, the representative of the law enforcement officers appeared at the Legislature to oppose such a measure. He has been joined by the Attorney General, who has representatives present at the Legislative session. The result was a prompt killing of the proposed measure outlawing the use of such evidence. If such evidence was excluded by a decision of the United States Supreme Court, it would be followed in the States.

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rehearing so that we may present further facts, figures and argument in respect to this matter.

Mr. Justice Clark says if he were in the Court when the *Wolf* case was before it, he would have voted the other way. Since there are four votes "the other way" in this case, his vote could not only grant a rehearing but properly present the law as he views it should be, and as we urge; it must be corrected to preserve our American ideals.

No longer is a man's house his castle in the United States. The police may break in at random; they may burglarize the place and make a key; they may listen to bedroom conversation and use the effect thereof with the approval of the highest court in the land.

Wolf v. Colorado says that:

> "The security of one's privacy against arbitrary intrusion by the police—where is at the core of the Fourth Amendment . . . "

is embodied in the concepts of due process found in the Fourteenth Amendment. Those are mere words if, in the next breath, the court says, that the privacy invaded by the arbitrary intrusion by the police won't make any difference because we will permit the court to receive the evidence that the police stole by invading this privacy.

Neither in morals nor ethics should the court allow this decision to stand. This court and the learned Jus-

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tice who wrote the majority opinion have not hesitated heretofore to reconsider prior decisions and to hold that they were in error. We think that it should do so with this case, and that a rehearing should be granted and the matter fully and fairly argued again on these fundamental principles, too sacred to American life to allow to stand as now uttered.

The court distinguishes this case from *Rochin v. California,* 342 U. S. 165. It says:

> "However obnoxious are the facts in the case before us, we do not involve coercion, violence or brutality to the person, but rather a trespass to property plus eavesdropping."

We do not understand the distinction which the court attempts to make between assault upon a man's person and that upon his property. The writs of assistance which were so odious to English speaking people and gave rise to the Fourth Amendment were assaults upon and seizure of property. The sacredness of the home is a sacredness of property rights, an invasion of man's castle is an invasion of his property.

In the *Rochin* case the evidence was illegally obtained. That necessarily had to be the basis of its decision. Whether the obtaining was by illegal search by physical assault or otherwise, its exclusion could only be on the basis that it was *illegally* obtained. The argument of the court seems to run that because in the *Rochin* case there was a physical assault upon his per-

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son that it made the evidence less competent to use than if officers ran a wire to the top of his house into his bedroom and listened to his private conversations for a month. Words spoken, things heard and recorded and played on a loud speaker, under such circumstances may be more hideous and obnoxious than a physical assault; but the essence of either is that the evidence was illegally obtained. Contrary to the principles of the Fourth Amendment, also Article I, Section 19 California Constitution. The means by which they were obtained make them no less illegal in either case. The prohibition of the Fourth Amendment forbids the use of evidence whether obtained by search of "the person or things to be seized." Similar language is contained in Article I, Section 19, of the Constitution of the State of California,[2] and we may add that the petitioner was compelled to exhibit his person to the examination of fluourescence, after the officer had entered his home without any search warrant or other legal process. To this extent there was coercion and physical force.

As we understood the *Wolf* case, Colorado, like most states in abortion cases, requires a corroboration of the woman witness. That corroboration required more than her testimony. The books taken from his office were in his own handwriting, having the name

[2]Article 1, §19. Searches and Seizures, restriction on.
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the person and things to be seized.

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of the woman in it and the date of her appointment. This, of course, would be corroboration. He did not read that record as holding that it was used initially to secure the name and addresses of his patients to look up and interrogate them. We did not ask this court to distinguish this case from the *Wolf* case as between a "mild" shock and a more "severe" shock. We asked this court to make the rule of law universal, whatever the shock—as we believe the Constitution intended. This court has made a distinction between "physical force in obtaining the evidence" and "illegal search." We realize, as does this court, that there has been wavering of enforcement of the Fourth Amendment by the inclusion of illegally secured evidence, as announced in *Weeks v. United States,* 232 U. S. 383. This court should now end that waiver in enforcement of the protection of a constitutional right. There should be no wavering in its enforcement and the declination by this court to any use of the fruits of an illegal venture. This court, as the great teacher, should set the example. Law enforcement would be the better for it, as pointed out by the Wickersham Commission in 1936. We cannot promote respect for law when the very persons employed to enforce it set an example of *lawlessness* themselves, and when this court, the ideal of purity and wholesomeness, will accept the fruits of the illegal ventures and allow it to be used.

Mr. Justice Clark, in his concurring opinion, says:

> "In light of the 'incredible' activity of the police here it is with great reluctance that I follow

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> *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction.' "

We know of no reason why a wrong decision should be followed, and we know of no greater or better time to convert the wrong decision and the wrong philosophy expressed thereby. If this court grants a rehearing and reversed this case, the effect of the *Wolf* decision will be extinguished. This Court, as a great teacher, must set the example. We appeal to Mr. Justice Clark to be the leader therein for other votes on the court that will agree with him.

The majority opinion says that our point two namely, that the state's use of compelled evidence compelled by the Federal Government was answered by *United States v. Kahriger,* 345 U. S. 22. We thought we distinguished the *Kahriger* case from our case by reason of two facts, (1) The *Kahriger* case was one merely an appeal based upon the statute itself wherein there was nothing before the court except that the defendant had secured a wagering stamp tax.

In the instant case, the Collector of Internal Reveenue not only furnished the stamp tax which the statute seems to authorize him to do, but also furnished all the reports made to the Bureau of Internal Revenue, which we had forwarded to the court as exhibits in this case. There is nothing in the statute, 65 Stats. 529, 26 U. S. C. (Supp. V) §3285 et seq. which provides

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that the Collector of Internal Revenues shall furnish to a State District Attorney the reports made to him on the tax. The statute says nothing as to whether these documents are or are not confidential; but, ordinarily, all tax returns to the Collector of Internal Revenue except those made public by the President or by regulations issued by the Secretary of the Treasury are confidential. It was these exhibits and documents from the Collector of Internal Revenues that furnished basic evidence upon which the appellant was convicted, for these are the documents in which a "confession" was contained that he had received money from wagering on horses and was paying a tax thereon.

The application for a stamp giving his home address and the date was no doubt a lead to the police, for which they installed the dictaphone and wired his house; but the documents that were of a convincing and convicting nature and happened subsequent to his application for a stamp was his payment of tax for the wagering and his declaration thereof under a statement that he might be prosecuted for under pains and penalty of perjury to the Bureau of Internal Revenue for the period in question.

This subject was not covered by the *Kahriger* case and is not covered in the court's footnote in this case. This court did not hold these subsequent reports and documents to the Internal Revenue "constitutional" in *United States v. Kahriger*. The extent of the statute is that it makes the requirement of purchasing a

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stamp, giving the home address and date to be made public, but says nothing about the other reports which were used. In the absence of such a statement in the statute, under the rule of *inclusio unius exclusio alterius* the matters not included are excluded and come within the general prohibition of the Internal Revenue Code that these other matters are confidential.

But, this court did not in *United States v. Kahriger* consider the further claim which we assert, that not even Congress can make "compelled evidence constitutional." This court, in *Boyd v. United States,* 116 U. S. 616, held that "not even Congress could pass an act which would compel the production of documents or evidence and that such a statute passed by the Congress would be held to be unconstitutional." (See *Boyd v. U. S.,* 116 U. S. 616). Such evidence compelled by the government ought not to be permitted to be used in support of a conviction.

Also for the reasons set forth in the able dissenting opinions of Mr. Justices Black and Douglas, concurring on the question of *extorted* confessions by the Federal Government, we urge a rehearing, and also we urge a rehearing for the reasons set forth in the able dissenting opinions of Mr. Justice Frankfurter with Mr. Justice Burton joining, for each of the reasons set forth therein.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

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CERTIFICATE OF COUNSEL

MORRIS LAVINE, counsel for the appellant, hereby certifies that he has filed the foregoing Petition for Rehearing in good faith and not for the purposes of delay, and that the same is based upon matters occurring since the filing of the Petition for Certiorari, and upon matters that are in the opinion rendered by this Court February 8, 1954, and no others.

.....

Morris Lavine

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